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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 607

PAUL DAVIS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
REASONS FOR GRANTING THE WRIT	2
STATEMENT OF QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
I. The Court of Special Appeals of Maryland denied the Petitioner his constitutional right to be represented by effective and adequate counsel at his trial by affirming the Lower Court's decision causing a constitutional prejudicial error which deprived the Petitioner of the due process of law guaranteed to him under the Sixth and Fourteenth Amendments of the Constitution of the United States	4
CONCLUSION	8
APPENDIX A—Opinion of the Court of Special Appeals of Maryland	A. 1
APPENDIX B—Order of the Court of Appeals of Maryland	B. 1

TABLE OF AUTHORITIES

Cases:

Gideon v. Wainwright, 372 U.S. 335 (1963), 83 S.Ct. 792, 9 L. Ed. 2d 799	7
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680	5
Miller v. Myers (E.D. Pa. 1966), 253 F.Supp. 55, 57	6
People v. Stoval, 239 N.E.2d 441 (1968), p. 443	5, 7
Porter v. United States (5th Cir.), 298 F.2d 461	5-6
State v. Goode, 171 N.W.2d 733	4

Constitutional Provisions, Statutes and Ordinances:

Sixth Amendment 2, 3, 4

Fourteenth Amendment 2, 3, 4

28 U.S.C.S. 1257(3) 2

Miscellaneous:

Cannon 6 of the American Bar Association 5

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Paul Davis, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Special Appeals of Maryland entered October 28, 1969 affirming convictions as to Indictment 5616 of the 1967 Docket, Criminal Court of Baltimore City, in the case of Paul Davis, Appellant v. State of Maryland, Appellee, September Term, 1969, No. 54.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is unreported and is included as Appendix A to this petition. The order of the Court of Appeals of Maryland is unreported and is attached as Appendix B hereto.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland sought to be reviewed was filed on October 28, 1969. The order of the Court of Appeals of Maryland denying the petition for Writ of Certiorari was entered on March 31, 1970. The jurisdiction of this Court is invoked under 28 U.S.C.S. 1257(3).

REASONS FOR WRIT

Petitioner, as reasons why the issuance of such a Writ is desirable and in the public interest, asserts:

"A. That a person is entitled to have effective and adequate representation at his trial and the failure to have said representation is a constitutional prejudicial error.

(1) In that a person is entitled to be represented by counsel who has no conflict with the State's leading witness so that he can be effectively and adequately represented by his counsel.

(2) In that it cannot be determined beyond a reasonable doubt whether the conflict of interest created by the dual roles played by the Petitioner's counsel, it cannot be determined if the Petitioner was properly and effectively represented at his trial.

(3) In that such prejudicial error violated Petitioner's right to due process under the Sixth and Fourteenth Amendments of the Constitution of the United States.

STATEMENT OF QUESTIONS PRESENTED

The public interest in the administration of criminal justice calls for a determination by the Court of the issue presented in this case. That issue is whether or not a constitutional violation contributed to the conviction of the Petitioner in the indictment in which he was charged.

The question presented here is whether the Court of Special Appeals of Maryland denied the Petitioner's rights under the Sixth and Fourteenth Amendments in affirming the conviction on Indictment 5616 in that the Petitioner's rights were violated because his counsel in this case had represented one of the State's witnesses in the past and possibly still represented him at the time of the trial.

STATEMENT OF THE CASE

Petitioner, Paul Davis, was indicted by the Grand Jury of Baltimore City on November 27, 1967 in one indictment charging him with Assault with Intent To Commit Murder. Petitioner was tried before Judge William O'Donnell, without a jury, on Indictment 5616 on March 19, 1968. The trial was concluded on March 20, 1968 and reset for a hearing on May 16, 1968 because there was a possibility of a Motion for New Trial being filed in the case. In the interim, the Petitioner discharged his counsel and retained new counsel because the Petitioner had learned of the dual roles played by his original counsel. On May 16, 1968 Mr. Davis appeared with his new counsel and was allowed to file a belated Motion for New Trial at that time because of the disagreement between him and his first lawyer. The Petitioner filed an affidavit at that time alleging that he had discovered after the trial that his initial counsel was involved in a serious conflict of interest in that he or a member of his firm represented one of the State's witnesses that testified against him. The Court refused to give any weight to the affidavit and denied the Motion for New Trial. The Court then sentenced Mr. Davis to a term of five years.

Petitioner filed an appeal to the Court of Special Appeals of Maryland raising several contentions, one of which was the lack of adequate and effective counsel for the Petitioner at his trial because of a conflict of interest of his original counsel. The Court of Special Appeals managed to avoid this question by stating in its opinion that since the Motion

for New Trial was filed beyond a three-day period which is allowed under the Maryland Rules of Procedure, the issue was not properly before the Appellate Court.

ARGUMENT

I. The Court of Special Appeals of Maryland Denied the Petitioner His Constitutional Right To Be Represented by Effective and Adequate Counsel at His Trial by Affirming the Lower Court's Decision Causing a Constitutional Prejudicial Error Which Deprived the Petitioner of the Due Process of Law Guaranteed to Him Under the Sixth and Fourteenth Amendments of the Constitution of the United States.

The Petitioner in this case claims that he was deprived of the due process of the law in that his original counsel at the time of the trial had a serious conflict of interest between him and one of the State's main witnesses. The Petitioner did not know of his counsel's dual role until after the case was over at which time the damage had already been done. As soon as the Petitioner learned of the conflict, he immediately fired the lawyer and retained new counsel but the Court would not listen to the plea that he had been deprived of the due process of law guaranteed to him under the Sixth and Fourteenth Amendments of the Constitution of the United States.

The Courts seem to be in agreement that a person is entitled to the assistance of counsel and that counsel should not have any conflict of interests in the case. The Petitioner, as well as all other defendants tried for a crime, is entitled to expect that their counsel will be acting on their behalf and no one else. The Courts cannot let counsel act in a dual capacity because the use of counsel under these conditions would amount to a farce. In *State v. Goode*, 171 N.W.2d 733 (S.D. 11/5/67), the Court stated in its opinion on the rule to represent conflicting interests, p. 743:

> "The rule forbidding an attorney to represent conflicting interests is not new. It is based on the ancient admonition 'That no man can serve two masters'. Individual lawyers, therefore, as well as courts have a duty to avoid such conflicting relationships and representations. According to Cannon 6 of the American Bar Association's Cannons of Professional Ethics 'It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts'. Within the meaning of this Cannon, a lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

The Goode case is different from this case in that the attorney was appointed to represent an indigent co-defendant. The Court ruled in the Goode case that there was a conflict of interest even though the defendants were tried separately and that he had been denied his constitutional rights to the effective assistance of counsel. This ruling was made because the testimony of the defendant made at co-defendant's trial was used against him at his trial. The Petitioner's case is different because it does not involve a conflict between co-defendants but a conflict between his counsel and one of the State's main witnesses.

It is possible that the Court would feel that the Petitioner is placed in a different position than that of an indigent defendant. The Petitioner did privately retain his original counsel but did not discover the conflict of interest until after his trial was over. The fact that the Petitioner paid for his own counsel should have no bearing on whether he was denied effective assistance of counsel. This very fact was pointed out by the Court in *People v. Stoval*, 239 N.E.2d 441 (1968) on p. 443 where it stated:

> "The right to the effective assistance of counsel is a fundamental right and entitles the person represented to the undivided loyalty of counsel. (*Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680.) In *Porter v. United States* (5th Cir.),

> 298 F.2d 461, it was said: 'The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court appointed. Such representation is lacking, however, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplication position where his full talents as a vigorous advocate having the single aim of acquittal by all means fair and honorable are hobbled or fettered or restrained by commitments to others."

Therefore, it does not matter whether a person is able to retain counsel or is indigent. The issue is whether a person is denied effective assistance of counsel due to a conflict of interests of the Petitioner's counsel.

In *People v. Stoval, supra,* the Supreme Court of Illinois held that a defendant whose Court appointed trial counsel also represented the jewelry store which the defendant was accused of burglarizing was denied effective assistance of counsel. The following language from the opinion demonstrates the clear reasoning behind the Court's ruling:

> "Under similar circumstances (i.e., where the defendant's counsel represented the victim of the burglary in an unrelated court suit) a United States District Court recently in United States ex rel. *Miller v. Myers* (E.D. Pa. 1966), 253 F.Supp. 55, 57; found that the defendant's constitutional right to counsel was abridged, stating, 'It takes no great understanding of human nature to realize that the individuals who had been burglarized might be less than happy and might go as far as to remove the attorney from their good graces if this defendant were acquitted or received a light sentence or were placed on probation. Moreover, if the case had gone to trial it might have meant an investigation involving the Carpenters (the owners of the store which had been burglarized) and even cross-examination of them on the stand. The entire situation could be very embarrassing for the lawyer who is naturally interested in having the legal business of the Carpenters,

> especially when they are much more able to compensate him for his services than the defendant. The circumstances here are such that an attorney cannot properly serve two masters."

The facts in the Petitioner's case are quite similar to those found in *People v. Stoval* in that the Petitioner claims that his original attorney or the attorney's firm had represented one of the State's main witnesses who testified against him in other legal matters. The question that arises in the Petitioner's case is whether counsel can serve a double role and properly represent his client during the trial. The Court in *People v. Stoval, supra,* stated what it thought when a defendant is represented by counsel with conflicting interests in the following terms:

> "The defendant's right to counsel under the Constitution is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no attorney at all. See *Gideon v. Wainwright*, 372 U.S. 335 (1963), 83 S.Ct. 792, 9 L. Ed. 2d 799. This situation is too fraught with the dangers of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation of realtor's rights whether or not it influences the attorney or the outcome of the case."

The Petitioner in this case as soon as he learns of the conflict of interest of his original counsel fires him and retains a new counsel. The Petitioner under affidavit in a belated Motion for New Trial tells the Court that he did not have effective assistance of counsel because of the conflict of interest of his trial counsel. The Court denied the motion and then sentenced him to a term of five years. On appeal the Court of Special Appeals of Maryland chose not to correct this constitutional prejudicial error by saying the question was not properly before the Court.

The Petitioner was denied the due process of the law guaranteed to him by the Constitution of the United States in that he was denied effective assistance of counsel.

CONCLUSION

For the reasons stated above, certiorari should issue to the Court of Special Appeals of Maryland as to Indictment 5616 of the 1967 Docket of the Criminal Court of Baltimore City.

Respectfully submitted,

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August 13, 1970

APPENDIX A

UNREPORTED

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND
SEPTEMBER TERM, 1969

No. 54

PAUL DAVIS

v.

STATE OF MARYLAND

Murphy, C.J.
Anderson
Morton
Orth
Thompson,
J.J.

PER CURIAM

Filed: October 28, 1969

The appellant, Paul Davis, was convicted of assault with intent to murder in a non-jury trial in the Criminal Court

of Baltimore and sentenced to five years imprisonment.

He contends in this appeal that he "had not been afforded a genuine and effective representation by his counsel who had represented one of the State's witnesses that testified against the defendant."

This issue was first raised below in a motion for a new trial. The record indicates that the verdict of guilty was rendered by the trial judge on March 20, 1968, and sentence was deferred pending the filing of a motion for a new trial. Thereafter, on May 16, 1968, an oral motion for a new trial was made at a hearing before the trial judge who stated that since there may have been a difference of opinion between appellant and his original trial counsel, "I will grant you leave, now, even though it is much more than three days after the verdict, to file a motion for a new trial." On May 17, 1968, a written motion for a new trial was filed and, after a hearing thereon, the motion was denied by the trial judge on December 2, 1968.

Md. Rule 567 provides: "A motion for a new trial shall be filed within three days, after the reception of a verdict * * *." This Rule is made applicable to criminal causes by Md. Rule 759. It is apparent, therefore, that the motion for a new trial was not filed within the time prescribed by the Rule. This Court held in *Ware v. State*, 3 Md. App. 62, 65-66, citing *Tull v. State*, 240 Md. 49, and *Giles v. State*, 231 Md. 387, that a trial judge is without jurisdiction to suspend the operation of the Rule by authorizing a belated filing of the motion. Nor could the motion be treated as a Post Conviction petition in the absence of a clear showing (not present here) that appellant consented to the matter being heard by the judge who presided "at the trial at which the petitioner was convicted * * *." Md. Rule BK44c. Accordingly, the issue is not properly before us.

Appellant further contends that the evidence was legally insufficient to sustain his conviction. We disagree. The trial judge, acting as trier of fact, determines the weight of the evidence and the credibility of the witnesses. *Love and*

Matthews v. State, 6 Md. App. 639, 643; *Presley v. State*, 6 Md. App. 419, 430, and is under no obligation to believe the exculpatory testimony of the defendant. *Gardner and Maple v. State*, 6 Md. App. 483, 494. On the record before us, we cannot say that the judgment of the lower court was clearly erroneous. Md. Rule 1086.

JUDGMENT AFFIRMED.

APPENDIX B

IN THE
COURT OF APPEALS OF MARYLAND
SEPTEMBER TERM, 1969

Misc. Docket No. 236

PAUL DAVIS :

v. : (No. 54 – September Term, 1969
Court of Special Appeals)

STATE OF MARYLAND :

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Apecial Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ Hall Hammond
Chief Judge

[SEAL]

Date: March 31, 1970.